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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAMES EARL DEWS, Defendant and Appellant.	F071803 (Fresno Super. Ct. No. 0536727-1) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Denise L. Whitehead, Judge.

James F. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Attorney General, Sacramento, California, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Gomes, J. and Poochigian, J.

INTRODUCTION

Appellant James Earl Dews filed an Application for Reduction of Felony Conviction and Petition for Resentencing on February 11, 2015, pursuant to Proposition 47 as set forth in Penal Code[1] section 1170.18. The superior court denied the petition and application on the grounds Dews was not eligible. Dews appealed and appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

In 1995, Dews was convicted of attempted first degree burglary (§§ 459, 460, 664), being a felon in possession of a firearm (§ 12021, subd. (a)), possession of cocaine (Health & Saf. Code, § 11350), and possession of cocaine while in possession of a loaded operable firearm (Health & Saf. Code, § 11370.1). It also was found true that Dews had suffered two prior felony convictions within the meaning of section 667, and had served a prior prison term within the meaning of section 667.5. In our unpublished opinion filed October 17, 1997, in case number F025007, we affirmed the convictions.

On December 17, 2012, Dews filed a motion for resentencing pursuant to section 1170.126. On January 10, 2013, the superior court denied the petition. There was no appeal taken from the January 10, 2013, order.

On February 11, 2015, Dews filed an Application for Reduction of Felony Conviction and a Petition for Resentencing pursuant to section 1170.18. Dews checked the box indicating he was requesting a hearing.

A hearing was held on May 11, 2015. At the hearing, the probation officer noted that Dews had been sentenced to a determinate term of 11 years and an indeterminate term of 50 years to life for the 1995 offenses. Consequently, Dews was still in prison. Counsel for Dews agreed to proceed in his absence.

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[1] References to code sections are to the Penal Code unless otherwise specified.

The superior court indicated that of the 1995 offenses, count 1 was the attempted first degree burglary and count 2 was the felon in possession of a firearm, both ineligible offenses. The superior court indicated count 3, possession of cocaine was potentially eligible for resentencing; however, the People maintained Dews had a "super strike" for violating "664/261(2)." Defense counsel did not want to be heard on the issue of the "super strike," and the superior court denied the petition and application.

Dews filed an appeal on June 26, 2015. The notice of appeal erroneously states the superior court ruled on June 11, instead of May 11, 2015.

DISCUSSION

Appellate counsel filed a brief pursuant to *People v. Wende, supra,* 25 Cal.3d at p. 436. Appellate counsel does point out that the People provided incorrect information as to the nature of Dews's prior conviction that constitutes a disqualifying conviction, or super strike, but acknowledges that Dews does have a disqualifying conviction.

Dews was notified of his right to file a supplemental brief. He filed a supplemental brief on February 18, 2016, which challenges the validity of his section 288 conviction.

A challenge to the validity of the underlying conviction for violating section 288 should have been raised in a direct appeal; the time for such an appeal expired many years ago. (Cal. Rules of Court, rule 8.308.) There is no provision in section 1170.18 that would vacate the underlying prior conviction; in fact, the opposite is true. Section 1170.18, subdivision (n) provides: "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act."

Furthermore, as the petitioner in the superior court, Dews bore the burden of proving eligibility for relief. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878–879.) Assuming, arguendo, Dews could challenge the underlying disqualifying conviction in a section 1170.18 petition, he failed to do so in the superior court.

Dews's prior conviction for a violation of section 288, subdivision (b) is a disqualifying conviction. Pursuant to section 1170.18, subdivision (i), section 1170.18 does not apply to anyone with a prior conviction for an offense specified in section 667, subdivision (e)(2)(C)(iv). Violations of section 288 are one of the offenses specified in section 667, subdivision (e)(2)(C)(iv). (§ 667, subd. (e)(2)(C)(iv)(III).)

Therefore, Dews does have a prior conviction that makes him ineligible for relief under section 1170.18. An appellate court reviews judicial action and not judicial reasoning; if the result arrived at by the superior court is correct on any theory, we affirm. (*Green v. Superior Court* (1985) 40 Cal.3d 126, 138; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 1004.)

The superior court's minute order states the reason for the denial: that Dews is ineligible because of a prior disqualifying conviction. Because the minute order does not specify the prior disqualifying conviction, there is no need to correct the record.

DISPOSITION

The May 11, 2015, order denying the Application for Reduction of Felony Conviction and Petition for Resentencing is affirmed.